Michigan Supreme Court

Dispute Resolution Task Force

Report to the Michigan Supreme Court

Addendum Report

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Background

In 1998, the Michigan Supreme Court appointed the Dispute Resolution Task Force to provide recommendations for guiding the development of alternative dispute resolution processes in Michigan's trial courts. The task force met throughout 1998, and issued its Report to the Michigan Supreme Court in January, 1999. The Report can be obtained either by contacting the State Court Administrative Office or through the Supreme Court's website: www.supremecourt.state.mi.us/courtdata/cdrpreport.pdf.

The Report included recommendations for adoption of two new court rules pertaining to alternative dispute resolution processes in general civil matters, a complete revision of MCR 3.216 pertaining to domestic relations mediation, and technical amendments of other rules. The Court ordered publication of the various rule proposals for comment in May, 1999. The formal written comment period closed on September 1, 1999, however the Court will continue to accept comments on the rule proposals at public hearings through March, 2000.

The task force reconvened on October 13, 1999 to assess whether to revise its original court rule recommendations in light of the written comments received by the Court. Approximately 70 items identified by 26 persons providing written comment were considered by the task force.

Process

Prior to the October 13, 1999 meeting, task force members received a complete set of the written comments and a synopsis compiled by State Court Administrative Office staff. For each item, task force members identified whether to amend or maintain its prior rule proposal recommendations.

The Court did not receive any comments in opposition to the task force's recommendation that the dispute resolution process outlined in MCR 2.403 and 2.404 be renamed "case evaluation." Six persons provided comment supporting the name change. In that the task force did not consider aspects of MCR 2.403 and 2.404 other than renaming the rule, comments proposing technical amendment of those two rules were directed to the Michigan Supreme Court Clerk for study at a later time.

Key Issues

Throughout this report, task force actions refer to the rule proposals published for comment by the Michigan Supreme Court under ADM 99-02 in May, 1999. Readers of this Addendum Report are encouraged to consult the original Dispute Resolution Task Force Report of January, 1999 for reference.

Significant new action by the task force included:

General Civil Mediation (proposed MCR 2.410)

- Unanimously reaffirming that non-lawyers should be able to serve as mediators on court rosters.

  Rationale: Persons serving as mediators are not providing case evaluation services, as under MCR 2.403. Mediators are "process" experts, and assist parties in reaching resolution of their own issues. Mediators neither evaluate the merits of cases, nor provide recommendations for settlement terms. A legal degree is unnecessary for this service.

- Requiring that the local ADR plan include provisions for providing access to ADR services by low income persons.

  Rationale: The original court rule proposal prohibited courts from ordering persons to attempt an ADR process if they could not afford it. Several commentators noted that while this protected low income persons from being ordered to an additional court event, it did not address the situation of low income persons wanting to take advantage of ADR processes. Because local ADR resources vary across the state, and in deference to its prior commitment to honoring local flexibility in the implementation of ADR services, the task force recommended that access to ADR services be identified in the local ADR plan.

- Expanding the provisions to be incorporated in local ADR plans.

  Rationale: Several writers suggested that a number of issues be addressed via court rule which the task force, again in deference to its early commitment to honoring local flexibility in the implementation of ADR services, considered most appropriate for inclusion in local ADR plans. These issues included: (a) identifying which counsel are to prepare appropriate court documents following conclusion of an ADR process; (b) time lines for receiving applications by prospective ADR providers; and (c) developing referral relationships with local dispute resolution centers affiliated with the Community Dispute Resolution Program.

- By majority vote, reaffirmed language authorizing judges to order parties to attempt a non-binding ADR process. A minority view was that parties should not be ordered to attempt mediation. "Majority" and "minority" statements, drafted by task force members, are appended to this report.

  Rationale: A majority of task force members viewed an order to attempt a non-binding ADR process as being akin to requiring parties to meet to "talk about settlement" with a neutral ADR provider. It was not an order to participate in meaningless costly and lengthy settlement discussions. Nor was it an order to participate through an entire process. Rather, it was an order to meet with an ADR provider to begin an ADR process with the understanding that any party could end it at any time.

  The minority view was that by itself, an order to attempt a non-binding ADR process–particularly mediation–creates an oxymoron in that mediation contemplates the voluntary participation of the parties. The referral to mediation may also harbor due process issues in terms of exacerbating the cost of litigation.

- Reaffirming the intended flexibility of the ADR rules in underscoring that parties may design and implement their own ADR processes outside of those contemplated by the new rules and the local ADR plan.

Domestic Relations (MCR 3.216, re-written)

- Requiring that local courts ordering a referral to mediation adopt a local mediation plan identifying "access to justice" considerations, e.g., how low income persons may obtain access to mediation services.

  Rationale: As with matters in the general civil division of the trial court, access to mediation must be ensured. Given the different ADR resources available across the state, task force members believe identification of those resources should be left to the local trial courts and included in local mediation plans.

- Clarifying (a) definitions of the mediation and evaluative mediation processes; (b) that parties must attend a mediation session in person unless excused by the mediator; and (c) that unless otherwise agreed to by the parties, a court referral is to mediation, and not to evaluative mediation.

  Rationale: Michigan has two basic mediation models in domestic relations, identified as "mediation" and "evaluative" mediation by the task force. Additional language clarifies these processes and identifies a presumptive process in trial courts' referring matters to mediation. A mediator's excusing

parties from personally attending mediation is added to accommodate situations where, chiefly as a result of distance, parties are not able to attend the mediation session.

- Adding protections that persons subject to personal protection orders or who are involved in child abuse and neglect matters may not be referred to mediation without a hearing before the judge making the referral.

  Rationale: The task force would establish a presumption against the mediation of matters involving persons the subject of personal protection orders or who are involved in child abuse and neglect matters. Understanding that there may be matters appropriate for mediation, such as by stipulation of the parties with their attorneys involved, the task force proposed that a hearing be held to establish the propriety of mediating in these circumstances.

Probate Court

- Expanding the array of ADR options available in the probate court.

  Rationale: The resolution of probate matters should have the same dispute resolution tools as available in the general civil division of the trial court. Language was added to clarify that probate matters are not limited to one dispute resolution process.

Rule Amendments

Note: The following reflect the task force's recommended revisions to the ADR rules published for comment by the Michigan Supreme Court in May, 1999. Except for subsection headings, proposed revisions to those rules appear as bold type.

SUBCHAPTER 2.400 PRETRIAL PROCEDURE; ALTERNATIVE DISPUTE RESOLUTION; ~~MEDIATION~~; OFFERS OF JUDGMENT; SETTLEMENTS

RULE 2.401 PRETRIAL PROCEDURES; CONFERENCES; SCHEDULING ORDERS

(A) **Time; Discretion of Court.** At any time after the commencement of the action, on its own initiative or the request of a party, the court may direct that the attorneys for the parties, alone or with the parties, appear for a conference. The court shall give reasonable notice of the scheduling of a conference. More than one conference may be held in an action.

(B) **Early Scheduling Conference and Order.**

(1) Early Scheduling Conference. The court may direct that an early scheduling conference be held. In addition to those considerations enumerated in subrule (C)(1), during this conference the court should:

(a) consider whether jurisdiction and venue are proper or whether the case is frivolous,

(b) refer the case to alternative dispute resolution if appropriate, either by agreement of the parties or, in the case of non-binding alternative dispute resolution, pursuant to court order, and

(c)~~(b)~~ determine the complexity of a particular case and enter a scheduling order setting time limitations for the processing of the case and establishing dates when future actions should begin or be completed in the case.

(2) Scheduling Order.

(a) At an early scheduling conference under subrule (B)(1), a pretrial conference under subrule (C), or at such other time as the court concludes that such an order would facilitate the progress of the case, the court shall establish times for

(i) the initiation or completion of an ADR process,

(ii)~~(i)~~ the completion of discovery,

(iii)~~(ii)~~ the exchange of witness lists under subrule (I), and

(iv)~~(iii)~~ any other matters that the court may deem appropriate, including the amendment of pleadings, the adding of parties, the filing of motions, or the scheduling of mediation, case evaluation, or other ADR process, a pretrial conference, a settlement conference, or trial.

More than one such order may be entered in a case.

(b) - (c) [Unchanged.]

(C) Pretrial Conference; Scope.

(1) At a conference under this subrule, in addition to the matters listed subrule (B)(1), the court and the attorneys for the parties may consider any matters that will facilitate the fair and expeditious disposition of the action, including:

(a) the simplification of the issues;

(b) the amount of time necessary for discovery;

(c) the necessity or desirability of amendments to the pleadings;

(d) the possibility of obtaining admissions of fact and of documents to avoid unnecessary proof;

(e) the limitation of the number of expert witnesses;

(f) the consolidation of actions for trial, the separation of issues, and the order of trial when some issues are to be tried by a jury and some by the court;

(g) the possibility of settlement;

(h) whether mediation, case evaluation, or some other form of alternative dispute resolution would be appropriate for the case, **and what mechanisms are available to provide such services**;

(i) the identity of the witnesses to testify at trial;

(j) the estimated length of trial;

(k) whether all claims arising out of the transaction or occurrence that is the subject matter of the action have been joined as required by MCR 2.203(A);

(l) other matters that may aid in the disposition of the action.

(2) Conference Order. If appropriate, the court shall enter an order incorporating agreements reached and decisions made at the conference.

(D) - (I) **[Unchanged.]**

RULE 2.410 ALTERNATIVE DISPUTE RESOLUTION (New)

(A) **Scope and Applicability of Rule.** All civil cases are subject to Alternative Dispute Resolution (ADR) processes unless otherwise provided by statute or court rule. Mediation of domestic relations actions is governed by MCR 3.216.

(B) **Definitions.** The following terms shall have the meanings set forth in this rule in applying and construing these rules with regard to ADR proceedings. The terms are not meant to restrict or limit the use of other ADR processes created by agreement of the parties.

(1) Alternative dispute resolution (ADR): Includes any process designed to resolve a legal dispute in the place of court adjudication.

(2) ADR provider: An individual or organization providing an ADR process. An individual ADR provider may be required to satisfy training and continuing education requirements as set forth in MCR 2.411.

(3) Arbitration: A forum in which each party and its counsel present its position before a neutral third party, who renders a specific award. If the parties stipulate in advance, the award is binding and is enforceable in the same manner as any contractual obligation. If the parties do not stipulate that the award is binding, the award is not binding, and a request for trial de novo may be made.

(4) Consensual Special Magistrate: A forum in which a dispute is presented to a neutral third party in the same manner as a civil lawsuit is presented to a judge. This process is binding and precludes the right of appeal.

(5) Moderated Settlement Conference: A forum in which each party and the party’s counsel present their position before a neutral or panel of neutral third parties. The panel may issue a non-binding advisory opinion regarding liability, damages, or both.

(6) Summary Jury Trial: A forum in which each party and the party’s counsel present a summary of their position before a panel of jurors. The number of jurors on the panel is six unless the parties agree otherwise. The panel may issue a non-binding advisory opinion regarding liability, damages, or both.

(7) Early Neutral Evaluation: A forum in which

attorneys present the core of the dispute to a neutral evaluator in the presence of the parties. This occurs after the case is filed, but before discovery is conducted. The neutral evaluator then gives a candid non-binding assessment of the strengths and weaknesses of the case. If settlement does not result, the neutral evaluator helps narrow the dispute and suggests guidelines for managing discovery.

(8) Neutral Fact Finding: A forum in which a dispute, frequently one involving complex or technical issues, is investigated and analyzed by an agreed-upon neutral fact finder who issues findings and a non-binding report or recommendation.

(9) Case Evaluation: A forum in which attorneys present the core of the dispute to a panel of attorneys as described in MCR 2.403.

(10) Mini-trial: A forum in which each party and the party's mini-trial counsel present their opinion, either before a selected representative for each party, before a neutral third party, or both to define the issues and develop a basis for realistic settlement negotiations. A neutral third party may issue an advisory opinion regarding the merits of the case. The advisory opinion is not binding unless the parties agree that it is binding and enter into a written settlement agreement.

(11) Mediation-Arbitration (Med-Arb): A hybrid of mediation and arbitration in which the parties initially mediate their disputes; but, if impasse is reached, remaining issues are arbitrated and the results of arbitration are binding on the parties unless otherwise agreed.

(12) Mediation: A forum in which a neutral third party facilitates communication between parties, assists in identifying issues, and helps explore solutions to promote a mutually acceptable settlement, and otherwise meets the requirements of MCR 2.411. A mediator has no authoritative decision-making power.

(C) **ADR Clerk.** The court shall designate the clerk of the court, the court administrator, the assignment clerk, or some other person to serve as the ADR clerk.

(D) ADR Plan.

(1) Each trial court that submits cases to ADR processes under MCR 2.410 shall adopt an ADR plan by local administrative order. The plan must be in writing and available to the public in the ADR clerk's office.

(2) At a minimum, the ADR plan must identify:

(a) how the list of persons available to serve as ADR providers will be maintained,

(b) the rotation system by which ADR providers will be assigned from the list,

(c) how information about the operation of the court's ADR program will be disseminated to litigants and the public, and

(d) how access to ADR processes will be provided for indigent persons.

(3) Plans incorporating the selection of ADR providers not serving as mediators must include provisions governing the qualifications of non-mediator ADR providers.

(4) Among other provisions, plans may identify which counsel are to prepare appropriate court documents following conclusion of an ADR process, time lines for receiving applications by prospective ADR providers, and referral relationships with local dispute resolution centers affiliated with the Community Dispute Resolution Program, among other provisions.

(E)~~(D)~~ **Notice of ADR Processes**. The court shall provide parties with information about available ADR processes as soon as reasonably practical. The information may include a list of ADR service providers.

(F)~~(E)~~ **Selection of ADR Process**.

(1) As soon as reasonably practical, the scheduling of a non-binding ADR process under this subrule may be made after consultation with all parties.

(2) If the parties cannot agree on an ADR process, or

if the court does not approve of the parties' selection of an ADR process **or provider**, the court may order the parties to utilize a non-binding ADR process, or may find that ADR is not appropriate.

[Task force minority alternate version:

(2) If the parties cannot agree on an ADR process, or if the court does not approve of the parties' selection of an ADR process or provider, the court may order the parties to utilize a non-binding ADR process ***with the exception of mediation****, or may find that ADR is not appropriate.]*

(3) The court's order shall designate the ADR process selected and the deadline for initiating the procedure. If ADR is determined to be inappropriate, the order shall so indicate.

(4) Upon motion by any party, or on its own initiative, the court may, at any time, issue an order for parties to participate in any non-binding ADR process **in addition to the case evaluation process of MCR 2.403**.

[Task force minority alternate version:

(4) Upon motion by any party, or on its own initiative, the court may, at any time, issue an order for parties to participate in any non-binding ADR process, ***with the exception of mediation****.]*

(5) A party may move, within **14** days after entry of an order to a non-binding ADR process, to **be exempt from** participation in the ADR process for good cause shown.

(6) Nothing in this rule prohibits parties from designing and implementing other alternative dispute resolution processes outside of the court's local ADR plan or this rule.

(G)~~(F)~~ **Selection of ADR Provider**.

(1) As soon as reasonably practical after the selection of an ADR process, parties shall select an ADR provider. If the parties are unable to agree on an ADR provider, the court shall appoint one from an approved list of ADR providers after consultation with all parties.

(2) The procedure for selecting an ADR provider from an approved list of ADR providers must be established by local administrative order adopted pursuant to MCR 8.112(B). **The ADR clerk shall assign ADR providers in a rotational manner that assures as nearly as possible that each ADR provider on a list or subsist is assigned approximately the same number of cases over a period of time. If a substitute ADR provider must be assigned, the same or similar assignment procedure shall be used to select the substitute.** A judge may be selected, but may not receive any payment and may not be the judge assigned the case.

(3) **The selection of ADR providers serving as case evaluators pursuant to MCR 2.403 is governed by MCR 2.404. The selection of ADR providers serving as domestic relations mediators is governed by MCR 3.216.**

(4) The rule for disqualification of an ADR provider is the same as that provided in MCR 2.003 for the disqualification of a judge.

(H)~~(G)~~ **Scheduling the ADR Process**. Upon receipt of the court's order, the ADR provider shall promptly work with the attorneys and parties to schedule the ADR process in accordance with the order. Factors that may be considered in arranging the process may include the need for limited discovery before the process, the number of parties and issues, and the necessity for multiple sessions.

(I)~~(H)~~ **Final Disposition.** If the case is settled through an ADR process, the attorneys shall complete the appropriate court documents to conclude the case (i.e., stipulation and order to dismiss, consent judgment, or other documents) **pursuant to the court's local ADR plan**. Within **7** days of the completion of the ADR process, the ADR provider shall advise the court, stating only who participated in the process, whether settlement was reached, and whether further ADR proceedings are contemplated.

(J)~~(I)~~ **Attendance at ADR Proceedings.**

(1) Appearance of Counsel. The attorneys attending an ADR proceeding shall be thoroughly familiar with the case and have the authority necessary to fully participate in the proceeding. The court may direct that the attorneys who intend to try the case attend

ADR proceedings.

(2) Presence of Parties. The court may direct that persons with authority to settle a case, including the parties to the action, agents of parties, representatives of lien holders, or representatives of insurance carriers:

(a) be present at the ADR proceeding;

(b) be immediately available at the time of the proceeding. The court's order may specify whether the availability is to be in person or by telephone.

(3) Failure to Attend; Default; Dismissal.

(a) Failure of a party or the party's attorney to attend a scheduled ADR proceeding, as directed by the court, constitutes a default to which MCR 2.603 is applicable or grounds for dismissal under MCR 2.504(B).

(b) The court shall excuse the failure of a party or the party's attorney to attend an ADR proceeding, and enter an order other than one of default or dismissal, if the court finds that

(i) entry of an order of default or dismissal would cause manifest injustice; or

(ii) the failure to attend was not due to the culpable negligence of the party or the attorney.

The court may condition the order on the payment by the offending party or attorney of reasonable expenses as provided in MCR 2.313(B)(2).

(K)~~(J)~~ **Fees.**

(1) An ADR provider is entitled to reasonable compensation based on an hourly rate commensurate with the ADR provider's experience and usual charges for services performed. ADR providers shall disclose their hourly rate on any lists of ADR providers made available to the public by courts or the State Court Administrative Office.

(2) The parties shall divide the costs of an ADR process on a pro-rata basis unless otherwise agreed

by the parties. The ADR provider's fee shall be paid no later than

(a) **42** days after the ADR process is concluded, or

(b) the entry of judgment, or

(c) the dismissal of the action, whichever occurs first.

(3) If acceptable to the ADR provider, the court may order an arrangement for the payment of the ADR provider's fee other than that provided in subrule (J)(2).

(4) If a party qualifies for waiver of filing fees under MCR 2.002 or the court determines on other grounds that the party is unable to pay for an ADR provider's services, and free or low-cost dispute resolution services are not available, the court shall not order that party to participate in an ADR process.

(5) The ADR provider's fee is deemed a cost of the action, and the court may make an appropriate judgment to enforce the payment of the fee.

(6) In the event either party objects to the total fee of the ADR provider, the matter may be scheduled before the trial judge for determination of the reasonableness of the fee.

(L)~~(K)~~ **Confidentiality.** Statements made during the ADR process, including statements made in briefs or other written submissions, may not be used in any other proceedings, including trial, unless the statement was quoting admissible evidence.

Rule 2.411 QUALIFICATION OF ADR PROVIDERS; STANDARDS OF CONDUCT (New)

(A) **Approval and Retention of ADR Providers.**

~~(1) Requirement. Each trial court that submits cases to ADR processes under MCR 2.410 shall adopt by local administrative order an ADR plan to maintain a list of persons available to serve as ADR providers and to assign ADR providers from the list.~~

~~(a) Plans incorporating the selection of ADR providers not serving as mediators must include provisions governing the qualifications of nonmediator ADR providers.~~

~~(b) The plan must be in writing and available to the public in the ADR clerk's office.~~

~~(c) The selection of ADR providers serving as case evaluators pursuant to MCR 2.403 is governed by MCR 2.404. The selection of ADR providers serving as domestic relations mediators is governed by MCR 3.216.~~

(1)~~(2)~~ ADR Provider Application. An eligible person desiring to serve as an ADR provider may apply to the ADR clerk to be placed on the list of ADR providers. Application forms shall be available in the office of the ADR clerk. The form shall include an optional section identifying the applicant's gender and racial/ethnic background. The form shall include a certification that

(a) the ADR provider meets the requirements for service under the court's selection plan, and

(b) the ADR provider will not discriminate against parties or attorneys on the basis of race, ethnic origin, gender, or other protected personal characteristic.

(2)~~(3)~~ Review of ADR provider Applications. The plan shall provide for a person or committee to review applications annually, or more frequently if appropriate, and compile a list of qualified ADR providers.

(a) Persons meeting the qualifications specified in this rule shall be placed on the list of approved

ADR providers. Selections shall be made without regard to race, ethnic origin, or gender. Residency or principal place of business may not be a qualification. Applications of approved ADR providers shall be available to the public in the office of the ADR clerk.

(b) Applicants who are not placed on the ADR provider list shall be notified of that decision. Within 21 days of notification of the decision to reject an application, the applicant may seek reconsideration of the ADR clerk's decision by the Chief Judge. The court does not need to provide a hearing. Documents considered in the initial review process shall be retained for at least the period during which the applicant can seek reconsideration of the original decision.

(3)~~(4)~~ Re-application. Persons shall be placed on the list of ADR providers for a fixed period, not to exceed 5 years, and must reapply at the end of that time in the same manner as persons seeking to be added to the list.

(4)~~(5)~~ Removal from List. **The court may remove from the list ADR providers** who have demonstrated incompetency, bias, made themselves consistently unavailable to serve as an ADR provider, or for other just cause. Within 21 days of notification of the decision to remove an ADR provider from the list, the ADR provider may seek reconsideration of the ADR clerk's decision by the Chief Judge. The court does not need to provide a hearing.

(B) **Supervision of the ADR Provider Selection Process**.

(1) The chief judge shall exercise general supervision over the implementation of this rule and shall review the operation of the court's ADR plan at least annually to assure compliance with this rule. In the event of noncompliance, the court shall take such action as is needed. This action may include recruiting persons to serve as ADR providers or changing the court's ADR plan.

(2) In implementing the ADR provider plan, the court, court employees, and attorneys involved in the procedure shall take all steps necessary to assure that as far as reasonably possible the list of ADR providers fairly reflects the racial, ethnic, and gender diversity of the

members of the state bar in the jurisdiction for which the list is compiled who are eligible to serve as ADR providers.

(C) **Qualification of Mediators**.

(1) Small Claims Mediation. District courts may develop individual plans to establish qualifications for persons serving as mediators in small claims cases.

(2) General Civil Mediation. To be eligible to serve as a general civil mediator, a person must meet the following minimum qualifications:

(a) Complete a training program approved by the State Court Administrator that contains the following components of mediation skills:

(i) information gathering

(ii) mediator relationship skills

(ii communication skills

(iv) problem-solving skills

(v) conflict-management skills

(vi) ethics

(vii) professional skills

(viii) working with lawyers in mediation; **and**

(b) Have one or more of the following:

(i) Juris doctor degree or graduate degree in conflict resolution; or

(ii) 40 hours of mediation experience over two years, including mediation, co-mediation, observation, and role-playing in the context of mediation.

(c) Observe two general civil mediation proceedings conducted by an approved mediator, and conduct one general civil mediation to conclusion under the supervision and observation of an approved

mediator.

(3) Approved mediators are required to obtain 8 hours of advanced mediation training during each 2-year period.

(4) If an applicant has specialized experience or training, but does not specifically meet the requirements set forth above, the applicant may apply to the ADR clerk for special approval. The ADR clerk shall make a determination on the basis of criteria provided by the State Court Administrator. Service as a case evaluator pursuant to MCR 2.403 shall not count as meeting qualifications to serve as a mediator under this section.

(5) Additional qualifications may not be imposed upon mediators.

~~(D) **Party Stipulation to Mediators and Other ADR Providers.** The parties may stipulate to use any mediator or other ADR provider, whether or not they are deemed qualified under MCR 2.411.~~

(D)~~(E)~~ **Qualification of Other ADR Providers.** The State Court Administrative Office may establish qualifications for ADR providers not serving as mediators.

(E)~~(F)~~ **Standards of Conduct for Mediators**.

(1) Introduction. These standards of conduct apply to all persons who act as a mediator pursuant to the dispute resolution programs of the court. They are designed to promote honesty, integrity, and impartiality in providing court-connected dispute-resolution services. These standards shall be made a part of all training and educational requirements for court-connected programs, shall be provided to all mediators involved in court-connected programs and shall be available to the public.

(2) Self-Determination. A mediator shall recognize that mediation is based upon the principle of self-determination by the parties. This principle requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement.

(3) Impartiality. A mediator shall conduct the mediation in an impartial manner. The concept of mediator impartiality is central to the mediation process. A mediator shall mediate only those matters in which it is

possible to remain impartial and even-handed. If at any time the mediator is unable to conduct the process in an impartial manner, the mediator is obligated to withdraw.

(4) Conflict of Interest.

(a) A conflict of interest is a dealing or relationship that might create an impression of possible bias or could reasonably be seen as raising a question about impartiality. A mediator shall **promptly** disclose all actual and potential conflicts of interest reasonably known to the mediator. After disclosure, the mediator shall decline to mediate unless all parties choose to retain the mediator. If all parties agree to mediate after being informed of conflicts, the mediator may proceed with the mediation unless the conflict of interest casts serious doubts on the integrity of the process, in which case the mediator shall decline to proceed.

(b) The need to protect against conflicts of interest also governs conduct that occurs during and after the mediation. A mediator must avoid the appearance of conflict of interest both during and after the mediation. Without the consent of all parties, a mediator shall not subsequently establish a professional relationship with one of the parties in a related matter, or in an unrelated matter under circumstances that would raise legitimate questions about the integrity of the mediation process. A mediator shall not establish a personal or intimate relationship with any of the parties that would raise legitimate questions about the integrity of the mediation process.

(5) Competence. A mediator shall mediate only when the mediator has the necessary qualifications to satisfy the reasonable expectations of the parties. Mediators appointed or recommended by the court are required to have the training and experience specified by the court.

(6) Confidentiality. A mediator shall maintain the reasonable expectations of the parties with regard to confidentiality. Any information relating to a mediation obtained by the mediator, whether such communication or materials are oral or written, is privileged and confidential and shall not be publicly disclosed without the written consent of all parties. The mediator, the

parties, and their counsel each has a qualified privilege during and after these proceedings to refuse to disclose and to prevent the mediator from disclosing materials and communications made during the mediation proceeding, whether or not the dispute was successfully resolved, except for the following:

(a) public information or information available through other legitimate sources;

(b) information concerning any conduct of the mediator alleged to constitute a violation of these standards, or the conduct of any counsel alleged to constitute a violation of the Rules of Professional Conduct, which may be reported to the appropriate disciplinary body;

(c) a report by the mediator to the court limited to identifying who participated in the ADR process, whether settlement was reached, and whether further ADR proceedings are contemplated; and

(d) data for use by court personnel reasonably required to administer and evaluate the dispute resolution program.

(7) Quality of the Process. A mediator shall conduct the mediation fairly and diligently. A mediator shall work to ensure a quality process and to encourage mutual respect among the parties. A quality process requires a commitment by the mediator to diligence and procedural fairness. There should be adequate opportunity for each party in the mediation to participate in the discussions. The parties decide when and under what conditions they will reach an agreement or terminate a mediation.

(8) Advertising and Solicitation. A mediator shall be truthful in advertising and solicitation for mediation. Advertising or any other communication with the public concerning services offered or regarding the education training and expertise of the mediator shall be truthful. Mediators shall refrain from promises and guarantees of results.

(9) Fees. A mediator shall fully disclose and explain the basis of compensation, fees, and charges to the parties. The parties should be provided sufficient

information about fees at the outset of a mediation to determine if they wish to retain the services of a mediator or to object to mediation. Any fees charged by a mediator shall be reasonable, considering, among other things, the mediation services, the type and complexity of the matter, the expertise of the mediator, the time required, and the rates customary to the community. The mediator's fee arrangement shall be reduced to writing before proceeding with the mediation.

(10) Obligations to the Mediation Process. Mediators have a duty to improve the practice of mediation by helping educate the public about mediation, making mediation accessible to those who would like to use it, correcting abuses, and improving their professional skills and abilities.

(F)~~(G)~~ **Standards of Conduct for Other ADR Providers.** The State Court Administrative Office may adopt Standards of Conduct for ADR providers not serving as mediators.

SUBCHAPTER 3.200 DOMESTIC RELATIONS ACTIONS

MCR 3.216 DOMESTIC RELATIONS MEDIATION

[Staff comment: this rule is completely rewritten]

(A) **Scope and Applicability of Rule, Definitions. All domestic relations cases are subject to mediation unless otherwise provided by statute or court rule. The application of mediation in general civil actions is governed by MCR 2.410.**

(1) Mediation. Mediation is a non-binding process in which a neutral third party facilitates communication between parties to promote communication and settlement.

(2) Evaluative Mediation. Evaluative mediation incorporates the definition of subrule (A)(1) however if requested by the parties, the mediator provides a written recommendation for settlement of any issues that remain unresolved at the conclusion of a mediation proceeding. Except for subsection (H), which relates exclusively to evaluative mediation, the use of the term "mediation" in this rule includes both processes.

(3)~~(2)~~ **On written stipulation of the parties, on written motion of a party, or on the court's initiative**, a court may submit to mediation **by written order** any contested issue in a domestic relations case as defined in the Friend of the Court act (MCL 552.502[g]; MSA 25.176[2][g]), including post judgment matters. **A court may not submit contested issues to evaluative mediation unless requested by all parties.**

(4)~~(3)~~ This rule does not restrict the Friend of the Court from enforcing custody, parenting time, and support orders.

(5)~~(4)~~ The court may order, on stipulation of the parties, the use of other settlement procedures.

(B) Mediation Plan.

(1) Each trial court that submits cases to mediation under MCR 3.216 shall adopt a mediation plan by local administrative order. The plan must be in writing and available to the public in the ADR clerk's office.

(2) At a minimum, the mediation plan must identify:

(a) how the list of persons available to serve as mediators will be maintained,

(b) the rotation system by which mediators will be assigned from the list,

(c) how information about the operation of the court's mediation program will be disseminated to litigants and the public, and

(d) how access to mediation will be provided for indigent persons.

(3) Among other provisions, plans may also include provisions identifying which counsel are to prepare appropriate court documents following conclusion of mediation, time lines for receiving applications by prospective mediators, and referral relationships with local dispute resolution centers affiliated with the Community Dispute Resolution Program.

~~(B) **Referral to Mediation.** On written stipulation of the parties, on written motion of a party, or on the court's initiative, contested issues in a domestic relations case may be referred to mediation under this rule by written order.~~

(C) **Objections to Referral to Mediation.**

(1) To object to mediation, a party must file a written motion to remove the case from mediation and a notice of hearing of the motion, and serve a copy on the attorneys of record within 14 days after receiving notice of the order assigning the action to mediation. The motion must be set for hearing within 14 days after it is filed, unless the hearing is adjourned by agreement of counsel or unless the court orders otherwise.

(2) A timely motion must be heard before the case is ~~submitted to mediation~~ **mediated**.

(3) Cases may be exempt~~ed~~ from mediation on the basis of the following:

(a) child abuse or neglect;

(b) domestic abuse, unless attorneys are present **at the mediation session**;

(c) inability of one or both parties to negotiate for themselves at the mediation, unless attorneys are present **at the mediation session**;

(d) reason to believe that one or both parties' health or safety would be endangered by mediation; or

(e) for other good cause shown.

(4) Parties who are subject to a personal protection order or who are involved in a child abuse and neglect matter may not be referred to mediation without a hearing to determine whether mediation is appropriate.

(D) **Selection of Mediator.**

(1) Domestic relations mediation will be conducted by a mediator selected as provided in this subrule.

(2) Parties may stipulate to the selection of a mediator. A mediator selected by agreement of the parties need not meet the qualifications set forth in subrule (E). The court must appoint a mediator stipulated to by the parties, provided the mediator is willing to serve within a period that would not interfere with the court's scheduling of the case for trial.

(3) If the parties have not stipulated to a mediator, the parties must indicate a preference of mediation processes: mediation or evaluative mediation. If the parties have not stipulated to a mediator, the judge may recommend, but not appoint one. If the court's recommendation is not accepted by both parties, a mediator will be selected from a list of qualified mediators maintained by the ADR clerk. From the list of qualified mediators the ADR clerk shall, on a ~~random or~~ rotational basis, assign a mediator to the case offering the process selected by the parties. The ADR clerk shall at least annually update the list of qualified mediators and make available the approved list of mediators to the public. The parties shall advise the mediator before the commencement of the mediation their preference regarding

mediation or evaluative mediation. If the parties do not agree on the type of mediation process, the ~~mediator will select the type of mediation~~ **referral will be for mediation and not evaluative mediation**.

(4) The rule for disqualification of an ADR provider is the same as that provided in MCR 2.003 for the disqualification of a judge.

(E) **Lists of Mediators.**

(1) A person eligible to serve as a mediator may apply to the ADR clerk to be placed on the list of mediators. Application forms shall be available in the office of the ADR clerk. A mediator shall designate on the form the ADR process(es) offered: mediation, and/or evaluative mediation. The form shall include an optional section identifying the applicant's gender and racial/ethnic background; however, this section shall not be made available to the public. The form shall include a certification that the mediator meets the requirements for service under this court rule.

(2) To be eligible to serve as a domestic relations mediator under this court rule, a person must meet the qualifications provided by this subrule.

(a) The applicant must ~~have a juris doctor degree or~~ be a licensed attorney; be a licensed or limited licensed psychologist; be a licensed professional counselor; have a masters degree in counseling, social work, or marriage and **family therapy**; have a graduate degree in a behavioral science; or have 5 years experience in family counseling.

(b) The applicant must demonstrate completion of the minimum training program approved by the State Court Administrator that contains the following components, of which at least 30 percent involve the practice of mediation skills, including:

(i) experience of divorce for adults and children;

(ii) family law and family economics;

(iii) mediation, negotiation, and conflict management theory and skills;

(iv) information-gathering skills and knowledge;

(v) relationship skills and knowledge;

(vi) communication skills and knowledge;

(vii) problem-solving skills and knowledge;

(viii) ethical decision making and values skills and knowledge;

(ix) professional skills and knowledge; and

(x) domestic violence

(3) Approved mediators are required to obtain 8 hours of advanced mediation training during each 2-year period.

(F) **Review of Applications.**

(1) The ADR clerk shall review applications at least annually, or more frequently, if appropriate, and compile a list of qualified mediators. Persons meeting the qualifications specified in this rule shall be placed on the list of approved mediators. Selections shall be made without regard to race, ethnic origin, or gender. Applications of approved mediators shall be available to the public in the office of the ADR clerk.

(2) Applicants who are not placed on the mediator list shall be notified of that decision and the reasons for it. Within 21 days of notification of the decision to reject an application, the applicant may seek reconsideration of the ADR clerk's decision by the ~~presiding judge of the family division~~ **Chief Judge**. The court does not need to provide a hearing. Documents considered in the initial review process shall be retained for at least the period during which the applicant can seek reconsideration of the original decision.

(3) The ADR clerk shall remove from the list any mediators who have made themselves consistently unavailable to serve as a mediator, or for other just

cause. Applicants who are not placed on the mediator list shall be notified of that decision. Within 21 days of notification of the decision to remove a mediator from the list, the mediator may seek reconsideration of the ADR clerk's decision by the presiding judge of the family division. The court does not need to provide a hearing.

(G) **Mediation Procedure.**

(1) ~~A letter may be sent from the presiding judge of the family division to the parties, explaining mediation in the family division and enclosing a copy of the~~ **The court shall provide parties with information about mediation in the family division as soon as reasonably practical. The information may include a** list of court-approved mediators.

(2) A matter may be ordered to mediation as soon as reasonably practical. The mediator must schedule a mediation session within a reasonable time at a location accessible by the parties.

(3) A mediator may require that no later than 3 business days before the mediation session, each party submit to the mediator, and serve on opposing counsel, a mediation summary that provides the following information where relevant:

(a) the facts and circumstances of the case;

(b) the issues in dispute;

(c) a description of the marital assets and their estimated value, where such information is appropriate and reasonably ascertainable;

(d) the income and expenses of the parties (if relevant);

(e) a proposed settlement; and

(f) such documentary evidence as may be available to substantiate information contained in the summary.

Failure to submit these materials to the mediator within the designated time may subject the offending party to sanctions imposed by the court.

(4) The parties must attend the mediation session in person **unless excused by the mediator**.

(5) Except for legal counsel, the parties may not bring other persons to the mediation session, whether expert or lay witnesses, unless permission is first obtained from the mediator, after notice to opposing counsel. If the mediator believes it would be helpful to the settlement of the case, the mediator may request information or assistance from third persons at the time of the mediation session.

(6) The mediator shall discuss with the parties and counsel, if any, the facts and issues involved. The mediation will continue until a settlement is reached, the mediator determines that a settlement is not likely to be reached, **the end of the first mediation session**, or ~~the parties agree to resume mediation at a subsequent date~~ until a time agreed to by the parties.

(7) Statements made during the ADR process, including statements made in briefs or other written submissions, may not be used in any other proceedings, including trial, unless the statement was quoting admissible evidence.

(8) If a settlement is reached as a result of the mediation, to be binding, the terms of that settlement must be reduced to a signed writing by the parties or acknowledged by the parties on an audio or video recording. After a settlement has been reached, the parties shall take steps necessary to enter judgment as in the case of other settlements.

~~(9) In the evaluative mediation process, if a settlement is not reached during mediation, the mediator, within a reasonable period after the conclusion of mediation, at the request of either party, shall prepare a written report to the parties setting forth the mediator's proposed recommendation for settlement purposes only. The mediator's recommendation shall be submitted to the parties of record only and may not be submitted or made available to the court.~~

(H) **Evaluative Mediation.** ~~**Acceptance or Rejection of Mediator's Report and Recommendation.**~~

(1) The provisions of MCR 3.216(H) apply to

evaluative mediation.

(2) ~~In the evaluative mediation process,~~ **If a settlement is not reached during mediation, the mediator, within a reasonable period after the conclusion of mediation, at the request of either party, shall prepare a written report to the parties setting forth the mediator's proposed recommendation for settlement purposes only. The mediator's recommendation shall be submitted to the parties of record only and may not be submitted or made available to the court.**

(3)~~(1) In the evaluative mediation process, I~~f both parties accept the mediator's recommendation in full, the attorneys shall proceed to have a judgment entered in conformity with the recommendation.

(4)~~(2)~~ If the mediator's recommendation is not accepted in full by both parties and the parties are unable to reach an agreement as to the remaining contested issues, the case shall proceed to trial.

(5)~~(3)~~ **A court may not impose** ~~There will be no~~ sanctions against either party for rejecting the mediator's recommendation. The court may not inquire and neither the parties nor the mediator may inform the court of the identity of the party or parties who rejected the mediator's recommendation.

(6)~~(I) **Court Consideration of Mediation Report and Recommendation.**~~ The mediator's report and recommendation may not be read by the court and may not be admitted into evidence or relied upon by the court as evidence of any of the information contained in it without the consent of both parties. The court shall not request the parties' consent to read the mediator's recommendation.

(I) **Fees.**

(1) A mediator is entitled to reasonable compensation based on an hourly rate commensurate with the mediator’s experience and usual charges for services performed.

(2) Before mediation, the parties shall agree in writing to pay the mediator's fee no later than:

(a) 4**2**~~5~~ days after the mediation process is concluded or the service of the mediator's report and recommendation under subrule (G)(9), or

(b) the entry of judgment, or

(c) the dismissal of the action, whichever occurs first. If the court finds that some other allocation of fees is appropriate, given the economic circumstances of the parties, the court may order that one of the parties pay more than one-half of the fee.

(3) If acceptable to the mediator, the court may order an arrangement for the payment of the mediator's fee other than that provided in subrule (J)(2).

(4) The mediator's fee is deemed a cost of the action, and the court may make an appropriate judgment under MCL 552.13(l); MSA 25.93(l) to enforce the payment of the fee.

(5) In the event either party objects to the total fee of the mediator, the matter may be scheduled before the trial judge for determination of the reasonableness of the fee.

(J) **Standards of Conduct. The Standards of Conduct for domestic relations mediators are governed by MCR 2.411(E).**

SUBCHAPTER 5.400 [PROBATE COURT] PRETRIAL PROCEDURES

Rule 5.403 Alternative Dispute Resolution ~~Mediation~~

The court may submit to mediation, case evaluation, or other alternative dispute resolution process one or more requests for relief in any contested proceeding. **If the court submits a request for relief in a contested matter to an alternative dispute resolution process, MCR 2.410 shall apply to the extent feasible. If the alternative dispute resolution process selected is case evaluation, MCR 2.403 and 2.404 shall apply to the extent feasible.** ~~Procedures of MCR 2.403 shall apply to the extent feasible, except~~ In case evaluations conducted pursuant to MCR 2.403, sanctions must not be awarded unless the subject matter of the ~~mediation~~ case evaluation involves money damages or division of property.

(End of Rule Proposals)

Majority Statement on the Topic of Court-Ordered Referral to Non-Binding Mediation

The task force had extensive discussions on the issue of whether judges should be vested with the explicit authority to order parties to participate in mediation. The majority of the task force recommended that this authority be codified in a court rule. The text of the proposal requires that trial courts confer with the litigants' attorneys before issuing an Order of Referral to Mediation. This authority is one of the most significant aspects of the task force's report. There are three major reasons for the task force's recommendations. They are:

I. This authority is consistent with the judiciary's responsibility to effectively and efficiently administer justice.

II. Court-ordered mediation can be effective.

III. Court-ordered mediation is already being used in a very limited number of jurisdictions.

I. The authority to order parties to mediate is consistent with a judge's responsibility to efficiently and fairly manage a docket.

Judges are charged with the responsibility for docket management. Mediation adds another tool for this task. Since 1995, the trial judges of our state have operated under an Administrative Order which delineates Case-Management Time-Standards. MCR 2.401 encourages early judicial intervention in case-scheduling MCR 2.401 (C) specifically states:

> "At a conference under this sub-rule, in addition to matters listed in sub-rule (B)(1), the court and the attorneys for the parties may consider any matters that will facilitate the fair and expeditious disposition of the action, including:
>
> (h) whether mediation or some other form of alternative dispute resolution would be appropriate for the case."

The majority proposal authorizes a judge to order the parties to participate in mediation much in the way MCR 2.403 allows submission of matters to case evaluation. (Unlike 2.403 case evaluation, in mediation, equitable claims could be considered and would bear no independent sanction.) Consistent with the spirit of MCR 2.401(C)(1) the mediation recommendation involves the attorneys for the litigants in any decision for judicial referral to mediation.

Mindful of Canon 3 (B)(4) which states that "[a] judge should not cause unnecessary expense by making unnecessary appointments...," judges' referrals to mediation should be made with consideration for the expenditure of resources. At present, judges have the discretion to order parties and non-parties to involuntarily expend resources. Some examples of this authority are:

MCR 2.302(C)(2)	Setting time and place for depositions, limiting them to "discovery only"
MCR 2.303	Depositions before trial or on appeal.
MCR 2.312 (B)	Sanctions.
MCR 2.114	Sanctions
MCR 2.405	Offers of Judgment Sanctions
MCR 2.420 (1)(b)	Requiring medical testimony to settle minor's claims.

In every case the judge's discretion is not unbridled. The referral to mediation and other non-binding ADR processes would be subject to similar scrutiny.

II. Judicious use of court-ordered mediation may be effective.

There was skepticism and resistance to MCR 2.403 case evaluation when it was introduced to the state. Over time that dispute resolution mechanism has become accepted as an effective tool for case resolution. It is the majority's view that the availability of court ordered (as opposed to voluntary) mediation would not render the process ineffective. It is anticipated that, after positive experience, litigants would view mediation as efficacious and appropriate.

The Federal experience with court-annexed facilitation gives great credence to its effectiveness as a "voluntary" process. While there was some anecdotal evidence of mediation which originated with a court-order, there is a dearth of hard data comparing "voluntary" versus the court-ordered mediation models. Grand Traverse County has a menu of dispute resolution mechanisms from which the judge in consultation with the litigants makes a selection. The overall settlement statistics from that jurisdiction are favorable but cannot be extrapolated to make the comparisons. Individual judges acknowledged that they have ordered reluctant parties to mediation with successful results, but they had no statistics contrasting those cases with circumstances where the parties made the mediation election. A valid analysis of voluntary vs judge referred facilitation will be informative.

The majority presumed that a court would rarely order mediation, reserving this option for circumstances where the judge had case-particular reasons for issuing the order. Some examples of these reasons are cases whose trials will be very lengthy and expensive (e.g., class actions) cases where a jury verdict could result in draconian economic results, or cases where the impediment to settlement is a clash of personalities.

III. Court ordered mediation is already available in some jurisdictions

The Task Force was informed that a few jurisdictions utilize court ordered facilitation. If a rule is created which precludes court-ordered mediation, these jurisdiction would be required to revamp their efforts with no empirical evidence that the programs are ineffective or oppressive.

Minority Statement on the Topic of Court-Ordered Referral to Non-Binding Mediation

The minority of the task force does not object to mandatory referral to alternative dispute resolution (ADR) processes in general. We do believe strongly, however, that no party should be compelled to enter into facilitative mediation.

Facilitative mediation is a form of alternative dispute resolution (ADR is sometimes called appropriate dispute resolution) that relies emphatically upon the willing participation of the parties. Compulsion, however subtle, to take part is inherently inimical to the effort, which usually involves parties who have an interest in making their future relationship tolerable in spite of the current controversy.

Since January 1, 1996, the United States District Court for the Western District of Michigan has offered voluntary facilitative mediation. The Court's experience over the past three years tells us that facilitative mediation works and works very well, settling approximately 70% of all cases referred. On the other hand, mandatory case evaluation (Michigan mediation) has never in the 16 years of use in the Western District resulted in more than a 28% settlement rate. Likewise, the Western District was part of a national pilot program utilizing mandatory arbitration. During the five years when this program was mandatory, settlement rates averaged 20%-30%. As soon as the court made the arbitration program voluntary, the rate of use dropped while the settlement rate increased significantly.

Further, in the Western District's facilitative mediation program the Court has surveyed every party, attorney and mediator in each case in which a mediation has occurred to determined program satisfaction. The responses to these surveys tell us that when participants approach facilitative mediation with a lukewarm or negative attitude, the case is not likely to settle and the participants are not enthusiastic about using the process again. Facilitative mediation works, but it works because it is voluntary.

In fashioning an appropriate court rule for the Supreme Court's consideration, the task force was required to consider and balance many ADR design issues. The decision as to whether facilitative mediation is voluntary or can be ordered by a court against the wishes of the parties also significantly affects how the rule is drafted to ensure equal access to justice and a sufficient number of qualified mediators.

Self-determination and good faith

The proposed rule on selection of ADR processes, Rule 2.410(3), reads:

. . . .

(1) If the parties cannot agree on an ADR process, *or if the court does not approve of the parties' selection of an ADR process*, the court may order the parties to utilize a non-binding ADR process, or may find that ADR is not appropriate. [Emphasis added.]

(2) . . . .

(3) Upon motion by any party, *or on its own initiative*, the court may, at any time, issue an order for parties to participate in any non-binding ADR process [Emphasis added.]

The proposed rule on standards of conduct for mediators, Rule 2.411(F), reads:

. . . .

(2) Self-determination. A mediator shall recognize that mediation is based upon the principle of self-determination by the parties. This principle requires that the mediation process rely upon the ability of the parties to reach a voluntary uncoerced agreement.

The latter provision is an unmistakable and laudable assertion of the essence of mediation. It is undermined, if not contradicted, by the authority given to the court in the former provision. The best mediators may be able to settle a few cases that have been ordered into facilitative mediation, but we are confident that the results will be much more satisfactory in the long run in mediations that the parties have "bought into" from the beginning. Certainly, more such cases will settle.

The reason is simple. If the mediation is truly voluntary, the litigants will approach their tasks in good faith, intending to get through the process with minimum damage to their long-term relationship. Forcing the parties into mediation impairs the effectiveness of the process and imposes upon the mediator an unresolvable conflict. In Michigan, this is particularly true, because Michigan attorneys generally have not experienced voluntary court-annexed facilitative mediation. Their experience of the present process under MCR 2.403, now to be called case evaluation, is certain to cause misunderstanding. We do not want to deprive the parties of the opportunity to make use of real voluntary facilitative mediation.

We suggest that the proposed Rule 2.410(E), subsections (2) and (4), read:

. . . .

(2) If the parties cannot agree on an ADR process, or if the court does not approve of the parties' selection of an ADR process, the court may order the parties to utilize a non-binding ADR process *with the exception of facilitative mediation*, or may find that ADR is not appropriate.

. . . .

(4) Upon motion by any party, or on its own initiative, the court may, at any time, issue an order for parties to participate in any non-binding ADR process *with the exception of facilitative mediation*.

Costs and equal access to justice

This Court has often reiterated, formally and informally, its belief that access to the means of redress of private grievances should be as equal as possible. We all know that obtaining that access is not easy for large segments of our population, although we continue to express faith in the ideal. Certainly, no one wants to place unnecessary obstacles in the way of a litigant's access to justice.

Mediation is not without costs. What would mandatory assignment of a case to facilitative mediation mean to an indigent or *pro se* litigant? Facilitative mediation, when done right, requires the mediator to invest some twelve hours or more in preparation and meetings with the parties. At today's typical rates, the cost of an average facilitative mediation will approach $3,000. The court has no business erecting barriers of this magnitude. Will the court pay the mediator? Will the court require the mediator to serve without pay? Requiring mediators to accept very many *pro bono* assignments could easily lead to difficulty in maintaining a qualified panel of mediators. Paying the mediators from court funds is even more problematic in most jurisdictions, which notoriously already have difficulty finding funds to pay defense counsel for criminal defendants.

Is a *pro se* litigant likely to be able to participate meaningfully in mediation? Some may do quite well in presenting their own case and in negotiating, but some may need some serious help in learning how to deal with the subtleties of non-confrontational facilitated decision-making. If the litigant has been ordered into the mediation by the court, does not the court have an obligation to give the litigant some training in the process? Who will pay for the training? Or should the court supply a court-paid attorney to represent the *pro se* party in mediation?

If facilitative mediation remains strictly voluntary, these issues are not nearly the stumbling-blocks that they are if the process is mandated. Those who do not wish to participate do not find themselves compelled to take part in an unfamiliar process, they are not required to disclose in mediation sessions matters that they consider private, and they are not burdened with having to pay the mediator. Those who think that the process may be beneficial are free to select it, and to accept the costs.

Qualification of mediators

Our belief is firm that mediators are special people, with special and valuable skills. There is some debate over whether a mediator must be a licensed attorney. In any event, our experience teaches us that some intensive training is necessary for even the most suitable mediator to become really effective in court-annexed cases. That training is an investment

underwritten in some cases by the public, but always undertaken by the individual mediator.

Even when cases are not immediately resolved through mediation, professional mediators find their work exciting and personally rewarding. Let us not now turn this experience into a chore, requiring mediators to confront hostility or indifference from parties who would rather not be there.

Given the high standards we expect of our mediators, including the expectation of extraordinary human-relations skills and insight, we do not want to burden them with cases in which the mediator's presence is not welcome. To protect the integrity of the overall effort, as well as to avoid mediator burn-out, we reiterate that whatever the merits may be of ordering parties to participate in other forms of ADR, facilitative mediation must remain voluntary.

Respectfully submitted,

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